Supreme Court, U.S.
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NO. 84-1891

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BRUNO

Appellant,

VERSUS

NEW ORLEANS DEPARTMENT OF POLICE

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA FOR THE CITY OF NEW ORLEANS

MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether appellant's jurisdictional statement manifests any complaint substantial enough to warrant Supreme Court jurisdiction or whether the questions on which the decision of the cause depends are so unsubstantial as not to merit further argument.

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....ii
Table of Authorities.....iii
Opinions Below.....1
Statement of the Case.....1
Substantiality of the Questions Presented.....5
Conclusion.....8
Certificate of Service.....9

TABLE OF AUTHORITIES

Page

JUDICIAL OPINIONS

Bruno v. Department of Police,
462 So. 2d 139 (La. 1985).....1,7

Gissi v. Codd,
391 F. Supp. 1333 (U.S.D.C.E.D.N.Y. 1976).....7

Longhran v. Codd,
432 F. Supp. 259 (U.S.D.C.E.D.N.Y. 1976).....7

Pickering v. Board of Education of Township High School, District 205, Will County, Illinois
391 U.S. 503, 88 S.Ct. 1731, 20 L. Ed. 2d 811 (1968).....6

Pienta v. Village of Schaumburg,
710 F.2d1258, (U.S.C.A. 7th Cir. 1983) and
536 F. Supp. 609 (U.S.D.C.E.D. Ill. 1982).....7

Tidal Oil v. Flanagan,
263 U.S. 444, 44 S. Ct. 97,
68 L. Ed. 382 (1924).....6

Zucht v. King,
260 U.S. 174, 43 S. Ct. 24, 67 L. Ed.
194. (1922).....6

POLICE DEPARTMENT REGULATIONS

ASOP 75.0, para. 2.....1,4,5

RULES

Rule 16 of the Rules of the Supreme Court of the U.S.....6

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MOTION TO AFFIRM

I.
OPINIONS BELOW

Appeal was taken from an order of City Civil Service Commission affirming dismissal of officer Vincent J. Bruno from the New Orleans Police Department for having violated departmental regulations governing conduct of police while on sick leave. The Court of Appeal affirmed, and appeal was taken. The Supreme Court of Louisiana, 462 So. 2d 139 (1985) held that (1) the Court of Appeal erred in affirming the commission on the basis of officer's violation of regulation of which he was not notified in his letter of termination and (2) officer's flagrant violations of regulations pertaining to sick leave justified his discharge and (3) as applied to officer, regulation ASOP 75.0 paragraph 2 did not unreasonably restrict his constitutional rights.

II.
STATEMENT OF THE CASE

Police officer Vincent Bruno, because of an alleged

ear infection, was on sick leave from the New Orleans Police Department from October 21, 1979, until February 1, 1980, on which last date, having exhaused accured sick leave, he was placed on "annual-sick."

The record discloses that Mr. Bruno used his sick-leave time to conduct the business of a local police union, of which he was president. Far from attempting to maintain the slightest pretense of illness or disability, Mr. Bruno traveled extensively and made frequent public appearances, thus flagrantly violating the regulations of the appointing authority and willfully refusing to discharge the duties of his employment. His breaches of discipline include but were not limited to the following egregious examples:

> On October 21, 1979 when Mr. Bruno first was placed on sick leave, he stated his place of confinement as Norgate, New Jersey. The next day he changed his place of confinement to another New Jersey city without departmental notice or permission.
>
> On November 24, 1979, he began a series of extensive travels to Detroit, Washington, and Miami in the vigorous pursuit of union business, again changing his place of confinement without notice or approval.
>
> On December 13, 1979, and January 16, 1980, while still on sick leave with his allegedly disabling ear infection, Bruno made two public appearances for the broadcast media.

On January 22, 1980, Bruno attended and addressed a gathering of the Krewe of Endymion at a mid-city hotel. On January 31, he absented himself from his place of sick-confinement to attend fund-raising festivities for President Carter at a downtown hotel.

On January 23, while on sick leave, and on February 5, while on annual sick-leave, Bruno attended union meetings.

Further, while on annual sick-leave, Bruno gave the following flagrant demonstrations of health and non-disability: travel to New York and Philadelphia for union business sometime in early March and appearing on yet another radio broadcast on March 10.

While he was on sick leave, on January 12, 1980, Bruno was warned by the City's Chief Administrative Officer of the impropriety of his public abuse of sick leave privileges. A further warning was given by Deputy Chief of Police David Kent on January 20. Reference to some of the dates cited above reveals that the warnings were conspicuously ignored.

On March 7, 1980, Bruno told the Internal Affairs Division of NOPD that he did not recall ever having heard of or gotten permission for any of his travels or appearances while on sick leave. None of his ranking officers, at the hearing below, could recall or find any record of any such notice or permission.

At the same interview with IAD on March 7, 1980, Bruno attempted to convince the City *for the first time,* that his need for sick-leave was created, not by the ear

infection originally claimed, but by an alleged heart condition. Pursuant to police regulations, he was ordered to present himself for an examination by Tulane Medical Center physicians. These doctors found Bruno fit to discharge his duties.

Since Bruno had been found fit for duty, the Chief ordered him off sick leave or annual sick-leave and back to work. Bruno refused, still claiming disability. Three days later, the "ailing" Bruno was back on his former "convalescent" regime, appearing on yet another radio talk show.

On March 14, 1980, by letter of the Chief of Police, Bruno's employment was terminated. The conduct described above was found to violate ASOP 75.0 paragraph 2, governing confinement to one's residence or other *approved* place of confinement of one on sick leave; Rule 4, paragraph 2, requiring adherence to instructions from an authoritative source; and other regulations, including Rule IX, Section 111 of the Rules of the Civil Service Commission.

Mr. Bruno appealed his dismissal to the New Orleans Civil Service Commission. Thorough hearings were held over the three days of May 14, June 17, and June 19, 1980. The Commission upheld the dismissal. The Commission specifically found that "the City carried its burden of proving that Mr. Bruno was not *reporting* absences from his place of confinement." The Commission further found that his admitted absences while on sick leave were not of the sort permitted by sick leave rules. Most importantly, the Commission implicitly found that the evidence in the record tended strongly to show that Mr. Bruno was fit at the time he disobeyed the lawful order of the Chief of Police

that he return to active duty. This disobedience, the Commission implied, would warrent dismissal even if the City had not proven the separate charges of earlier sick-leave confinement rules' violations.

III.
SUBSTANTIALITY OF THE QUESTIONS PRESENTED

It is appellant's claim that Regulation ASOP 75, paragraph 2 of the New Orleans Police Department curtails plaintiff's constitutional rights to equal protection, to travel, to vote, to attend a church of his choice and to due process.

ASOP 75, paragraph 2 provides:

> A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of Confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The Member shall notify his Unit of Assignment before leaving and upon returning from such a visit.

On its face the regulation would appear to limit appellant's free exercise of his constitutional rights. However, under a rational relationship test the regulations are sufficiently related to legitimate goals of sufficient staffing, reduction of cost of police force, efficiency and others.

Rule 16 of the Rules of the Supreme Court of the United States provides in part:

> (c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.
>
> (c) The court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

It is appellee's contention that the questions involved on which the decision of the case depends are so unsubstantial as not to need or merit further argument. It is a jurisdictional prerequisite to Supreme Court review of state court judgments that the federal question raised by the appeal be "substantial". *Zucht v. King* (1922) 260 U.S. 174, 43 S.Ct. 24, 67 L. Ed. 194. *Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 44 S.Ct. 197, 68 L. Ed. 382.

Appellee admits that rights secured appellant by the Bill of Rights are worthy of special protection. However, the Supreme Court has indicated that in certain areas a state has an interest as an employer which differs significantly from its interests in regulating the citizenry, in general, and that when a state acts as an employer the courts should evaluate those actions under a more deferential standard that strict scrutiny. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois,* 391 U.S. 563, 88 S. Ct. 1731, 20L. Ed. 2d 811 (1968).

Two courts which reviewed the constitutionality of New York City Police Department regulations in suits similar to this one held that the rational relationship test applied. See *Gisi v. Codd,* 391 F. Supp. 1333 (E.D.N.Y. 1974) and *Loughram v. Codd,* 432 F. Supp. 259 (E.D.N.Y. 1978). The regulations violated by appellant are a constitutionally permissable means rationally devised to achieve the compelling public interest in an efficient and ever-ready police force.

However, these Constitutional questions have received adequate airing in both the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court. Appellant relies in the main on *Pienta v. Village of Schaunburg, Ill.,* 710 F. 2d 1258 (1983) which held that a provision similar to ASOP 75, paragraph 3 violated certain fundamental rights. On rehearing, the majority in the Court of Appeal analyzed the applicability of *Pienta* to this situation and concluded that its strict scrutiny analysis was not appropriate. The Supreme Court felt that such rules are not per se arbitrary and irrational and can be enforced unless, as applied, they unreasonably restrict constitutional rights. The court concluded:

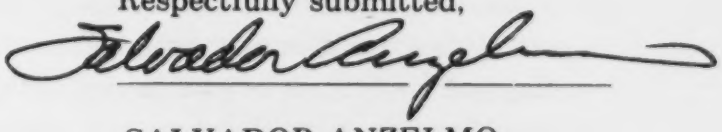
> While the regulation may present serious constitutional problems in other contexts, Bruno's flagrant violations over a period of almost five months were prejudicial to the conduct of the New Orleans Police Department and justified his discharge. As applied to Bruno, the regulation did not arbitrarily or unreasonably restrict his constitutional rights.

Bruno v. Department of Police, 462 So.2d 139 (La. App. 4th CIr. 1985)

IV.
CONCLUSION

Notwithstanding appellant's claim that he occupies the position of the Grinch That Stole Christmas as a result of the police strike he called that cancelled Mardi Gras, no showing of discrimination or violation of equal protection has been made. The record indicates that appellant was free to enjoy the rights guaranteed him under the constitution, and that, while supposedly ill, he was able to enjoy the freedoms of travel and speech. ASOP 75.0 paragraph 2 is not designed to restrict enjoyment of those rights but rather to ensure that order, discipline and morale are maintained within the Police Department of New Orleans. Those goals are rationally related to the means sought to obtain them and appellant's discharge in furtherance of those goals was not irrational or arbitrary. In fact appellant's constitutional claims appear to be an afterthought, a means by which he can prolong litigation already adequately settled at the state level. Appellant's claim is too insubstantial to merit review before the Supreme Court. Accordingly the judgement of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,



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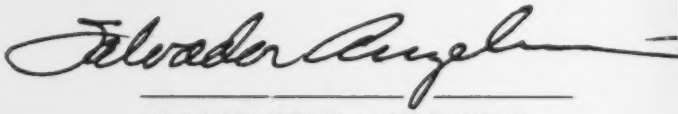
CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Motion to Affirm have been served on counsel for all parties by depositing same in the United States Mails, postage prepaid and properly addressed, this 23rd day of August, 1985.



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